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SUPREME COURT OF THE UNITED STATES
October Term, 1993
No.

Supreme Court, U.S.
FILED

Myong Magnuson, d/b/a
Yoshiko's Sauna,

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Petitioner,

vs.

City of Minneapolis,

Respondent.

PETITION FOR WRIT OF CERTIORARI
TO THE
SUPREME COURT OF MINNESOTA

Randall D.B. Tigue
Attorney for Petitioner
2620 Nicollet Avenue
Minneapolis, Minnesota 55408
(612) 874-9903

36 pp

Questions Presented

1. May the City of Minneapolis, consistent with the requirements of the Due Process Clause of the Fourteenth Amendment to the United States Constitution, deprive Petitioner of all use of her property for up to one year, on the basis of the results of criminal proceedings in which she had no opportunity to participate or be heard?

2. May the City of Minneapolis, consistent with the Due Process Clause of the Fourteenth Amendment and the freedom of association provision of the First Amendment to the United States Constitution, deprive Petitioner of all use of her property for a period of one year, on the basis of criminal conduct of third parties, in the absence of any showing that Defendant either knew of such conduct or specifically intended to further such unlawful conduct?

Parties and Proceedings Below

The parties to the proceedings below were the City of Minneapolis, Plaintiff: Helen Fisher and Un Sil Olson (Defendants), who were the landlords of the subject premises as tenants-in-common; Petitioner Myong Magnuson, and Suzy Kotts, a tenant of Defendant Olson. On Appeal, the Attorney General of the State of Minnesota intervened to defend the constitutionality of the statute under challenge.

TABLE OF CONTENTS

	Page
Questions Presented	i
Table of Authorities	iii
Opinions Below	1
Jurisdiction	1
Constitutional and Statutory Provisions Involved	1
Statement of the Case	1
Argument:	
I. The decision of the Minnesota Supreme Court upholding the Constitutionality of Minnesota Statutes Section 617.81-617.87, permitting the closing of Petitioner's Premises, as a result of criminal proceedings to which she was not a party and at which she had no opportunity to be heard is in conflict with the decisions of this Court, requiring review under Rule 10(b) of this Court	12
II. The Statutes are further unconstitutional in that they violate Petitioner's right to Freedom of Aassociation as guaranteed by the First and Fourteenth Amendments to the United States Constitution	26
Conclusion	29

TABLE OF AUTHORITIES

Constitution:

First Amendment to the United States Constitution 15,22,26

Fourteenth Amendment to the United States Constitution 13,19,26

Minnesota Statutes:

Minnesota Statutes Sections 609.321 . . . 27

Minnesota Statutes Section 609.324 . . . 27

Minnesota Statutes Section 617.80-617.87 . . 1,2,20,26

Minnesota Statutes Section 617.80 . . . 27

Minnesota Statutes Section 617.81 . . . 2,12,28

Minnesota Statutes Section 617.82. . . 2,5

Minnesota Statutes Section 617.83 . . . 3,6,12

Minnesota Statuts Section 617.84 . . . 3,12

Minnesota Statutes Section 617.85 . . . 3,4

Minnesota Statutes Section 617.86 . . . 4

Minnesota Statutes Section 617.87 . . . 4,6

Federal Statutes:

Title 21 U.S.C. Section 881(a)(7) . . . 19

Title 28 U.S.C. Section 1257(a) . . . 1

Court Rules:

Rule 803(22) of the Federal Rules of Evidence . 23

Rule 803(22) of Minnesota Rules of Evidence . 23

Cases:

American Postal Workers Union, Columbus Area Local, AFL-CIO v. United States Postal Service 17,23

Board of Directors of Rotary International v. Rotary Club of Duarte, 481 U.S. 537 (1987) . . 29

Blonder-Tongue Laboratories, Inc. v. University of Illinois Foundation 402 U.S. 313, (1971) 18

City of Minneapolis v. Fisher, 504 N.W. 2d 520 (Minn. App. 1993) 1,7,12

Coates v. Cincinnati, 402 U.S. 611 (1971) . . 29

Elfbrandt v. Russell, 384 U.S. 11 (1966) . 27

Fisher v. Snyder, 346 F. Supp. 396 (D. Neb. 1972), aff'd, 476 F. 2d 375 (8th Cir. 1973) . . . 29

Fuentes v. Shevin, 407 U.S. 67, (1972) . . 18

Healy v. James, 408 U.S. 169 (1972) . . . 18

Hvamstad v. Suhler, 727 F. Supp. 511 (D. Minn. 1989), aff'd, 915 F. 2d 1218 (8th Cir. 1990) 27

Keyishian v. Bd. of Regents of the State University of New York, 385 U.S. 589 (1967) . 27

Martin v. Wilks, 490 U.S. 755 (1989) . . . 27

McKinney v. Alabama, 424 U.S. 669, (1976). . . 13,15,17,18 21,22

N.A.A.C.P. v. Claiborne Hardware Co., 458 U.S. 886 (1982) 27

North Carolina v. Alford, 400 U.S. 25, 91 S.Ct. 160, 21 L.Ed. 2d 162 (1970) . . . 20

Roberts v. U.S. Jaycees, 468 U.S. 609 (1984) . . 29

Sawyer v. Sandstrom, 615 F. 2d 311 (5th Cir. 1980) . 29

Scales v. United States, 367 U.S. 203 (1961) . . 29

State v. Goulette, 258 N.W. 2d 758 (Minn. 1977) 20

Tyson v. New York City Housing Authority, 369 F. Supp. 513 (S.D.N.Y. 1974) . . . 29

United States v. Good Real Property, ___ U.S.___, 62 U.S.L.W. 4013 (December 13, 1993) 19,20

United States v. Robel, 389 U.S. 258 (1967) . . 27

United States v. Schmidt, 604 F. 2d 236 (3rd Cr. 1979) 16,23

United States v. Thoresen, 428 F. 2d 654 (9th Cir. 1970) 15

Opinions Below

Review is sought of the decision of the Minnesota Supreme Court, entered September 30, 1993, denying Petitioner's Petition for Review. The decision is unreported and is set forth in the Appendix at A.202. The Minnesota Supreme Court refused to grant review of the decision of the Minnesota Court of Appeals in City of Minneapolis v. Fisher, 504 N.W. 2d 520 (Minn. App. 1993).

Jurisdiction

Review is sought of the decision of the Minnesota Supreme Court entered September 30, 1993. Jurisdiction is based upon Title 28 U.S.C. Section 1257(a).

Constitutional and Statutory Provisions Involved

This case involves the First and Fourteenth Amendments to the United States Constitution, Minnesota Statutes Section 617.80-617.87, the texts of which are set forth in the Appendix at A.206 - A.211.

Statement of the Case

In this action, Respondent sought and obtained a temporary injunction and a permanent abatement of an alleged nuisance, occurring at Yoshiko's Sauna, 117 North Washington, Minneapolis, Minnesota,

pursuant to the provisions of Minnesota Statutes Sections 617.80-617.87.[1]

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The statute provides, in pertinent part,:

"617.80. **Definitions**

Subdivision 1. **Generally**. The definitions in this section apply to Sections 617.80 to 617.87.

Subd. 2. **Building**. 'Building' means the structure suitable for human shelter, a commercial structure that is maintained for business activities but involve human occupation or any portion of such structures.

Subd. 3. Movable property. 'Movable property' means furniture and fixtures.

Subd. 4. Prostitution. 'Prostitution' or 'prostitution related offenses' means the conduct defined in Sections 609.321 to 609.324. ***

Subd. 6. Disorderly House. 'Disorderly house' has the meaning assigned to it in Section 609.33.

Subd. 7. Owner. 'Owner' for purposes of Sections 617.80 to 617.87 means the person in whose name the building or affected portion is recorded with the county auditor for taxation purposes.

Subd. 8. Interested Party. 'Interested party' for the purposes of Sections 617.80 to 617.87 means any lessee, tenant, or occupant of a building or affected portion of a building and any known agent of an owner, lessee, tenant, or occupant.

617.81. Nuisance; acts constituting; injunction; notice.

Subdivision 1. Injunction. In order to maintain a temporary injunction under Section 617.82 or a permanent injunction or order of abatement under Section 617.83 the provisions of 617.80 to 617.87 must be followed.

Subdivision 2. Acts constituting a nuisance. For purposes of Sections 617.80 to 617.87 a public nuisance exists upon proof of three or more misdemeanor convictions or two or more convictions, of which at least one is a gross misdemeanor or felony, within the previous two years for:

(1) acts of prostitution or prostitution-related offenses committed within the building;* * *

Subdivision 3. Notice. Notice of a conviction described in Subdivision 2 must be mailed by the Court Administrator to the owner of the building where the offense was committed and all other interested parties and must filed with the County Recorder's office. This notice is considered sufficient to inform all interested parties that the building or portion of it is being used for purposes constituting a public nuisance.

617.82. Temporary Order.

Whenever a city attorney, county attorney, or the attorney general has cause to believe that a nuisance described in Section 617.81 Subdivision 2, exists within the jurisdiction the attorney serves, that attorney may by verified petition seek a temporary injunction in district court in the county in which the alleged public nuisance exists. No temporary injunction may be issued without a prior show cause notice of hearing to the respondents named in the petition and an opportunity for respondents to be heard. Upon proof of a nuisance described in Section 617.81 Subdivision 2 the court shall issue a temporary injunction. Any temporary injunction issued must describe the conduct to be enjoined.

617.83. Injunction; order of abatement.

Upon proof of a nuisance described in Section 617.81, Subdivision 2, the court shall issue a permanent injunction and enter an order of abatement. The permanent injunction must describe the conduct permanently enjoined. The order of abatement must direct the closing of building or a portion of it for one year except as otherwise provided in Section 617.84 or 617.85, unless sooner released pursuant to Section 617.87. Before an abatement order is enforced against a building or portion of it, the owner must be served with the abatement order and a notice of the right to file a motion under Section 617.85 in the same manner that a summons is served under the Rules of Civil Procedure. A copy of the abatement order shall also be posted in a conspicuous place on the building or the affected portion.

617.84. Movable property.

The order of abatement may direct the removal of movable property used in conducting or maintaining the nuisance and direct the sale of property belonging to respondent who was notified or appeared. The sale shall be conducted pursuant to the provisions of Chapter 550 on the sale of property on execution. A person appointed by the court as a receiver of the building may use a building or portion of it which is the subject of an abatement order in a manner approved by the court. Cost of the sale on execution, moving and storage fees, and any receivership must be paid out of the proceeds of the sale of movable property or any rents collected during the receivership. The balance from the sale of movable property must be paid to the owner of the property. The balance of any rents collected during any receivership shall be paid to the treasury or unit of government which brought the abatement action.

617.85. Nuisance; motion to cancel lease.

Where an abatement of a nuisance is sought and the circumstances that are the basis for the requested abatement involved the acts of

a commercial or residential tenant or lessee of part or all of a building, the owner of the building that is subject to the abatement proceeding, may file before the court that has jurisdiction over the abatement proceeding a motion to cancel the lease or otherwise secure restitution of the premises from the tenant or lessee who has maintained or conducted the nuisance. In addition to the grounds provided in Chapter 566, the maintaining or conducting a nuisance as defined in Section 617.81, Subdivision 2, by a tenant or lessee, is an additional ground authorized by law for seeking the cancellation of a lease for restitution of the premises. It is no defense to a motion under this section by the owner that the lease or other agreement controlling the tenancy or leasehold does not provide for eviction or cancellation of the lease upon the grounds provided in this section.

Upon a finding by the court that the tenant or lessee has maintained or conducted a nuisance in any portion of the building under control of the tenant or lessee, the court shall order cancellation of the lease or tenancy and grant restitution of the premises to the owner. The court must not order abatement of the premises if the court:

(a) Upon motion of the building owner cancels a lease or tenancy and grants restitution of that portion of the premises to the owner; and

(b) Further finds that the acts constituting the nuisance as defined in Section 617.81, Subdivision 2 were committed in a portion of the building under the control of the tenant or lessee whose lease or tenancy has been canceled pursuant to this section.

617.86. Contempt.

Whoever violates a temporary injunction, permanent injunction, or abatement order granted under Sections 617.80 to 617.87 may be adjudged in contempt of court.

617.87. Release of Property.

If, after an order of abatement has been entered, the owner appears and pays the cost of the action and files a bond in an amount determined by the court, but not to exceed $50,000, conditioned that the owner will immediately abate the nuisance for a period of one year, the court may, if satisfied of the owner's good faith, order release of the building or portion of it which is subject to the order of abatement. If the premises are released, for each day of the term of the bond that the owner knowingly permits any part of the premises to be used for any activity which was the basis of the abatement order, the owner shall forfeit $1,000 under the bond. Forfeiture under the bond does not relieve the owner from prosecution for contempt. Release of the property pursuant to this section does not release it from an injunction issued under Section 617.83 or any other judgment, penalty, lien or liability to which it may

The complaint in the instant case alleged that one gross misdemeanor and one misdemeanor prostitution conviction out of conduct arising on the subject premises had occurred in the two years preceding the commencement of the action (Appendix at A.4 - A.5). Subsequent to the commencement of the action, there were two additional misdemeanor prostitution convictions arising out the subject premises.[2] There is no allegation that Petitioner Magnuson was a party to any of those criminal prosecutions, or had any opportunity to participate.[3] Nonetheless, those convictions, as against Petitioner, are conclusive evidence of the existence of a public nuisance on the premises.

By the plain language of Minnesota Statutes Section 617.82, upon proof of the criminal convictions to a district court, the court is mandated to issue a temporary injunction. Under Section 617.83, the

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be subject by law."

[2]See Findings No. 6 of the district court's order of February 24, 1993, set forth in the Appendix at A.170 - A.172.

[3]See district court findings, paragraph 6, Appendix at A.170 - A.172, indicating the Defendants convicted were Suzy W. Kotts, convicted March 27, 1991; Lola Jen Stenadore, a/k/a Ekoena, convicted September 19, 1991; Kathie Lee Mos, convicted May 7, 1992; and Frances Tamel Brown, convicted September 24, 1992.

court is not only mandated to issue a permanent injunction, but also an order of abatement, which "must direct the closing of the building or a portion of it for one year...(emphasis supplied)"

As a result, solely on the basis of criminal convictions for conduct which Petitioner may not have known about or authorized, and taking place in criminal proceedings in which Petitioner had no opportunity to be heard or participate, Minnesota courts are mandated to close Petitioner's building for all purposes, for up to one year. The only way a building owner can secure the use of the building for any purpose is to post a substantial bond, up to $50,000.00, subject to $1,000.00 per day forfeiture and contempt proceedings, if any act of prostitution were to take place on the premises.

Even this relief is by no means guaranteed, and is entirely discretionary with the state court. See Minnesota Statutes Section 617.87, which provides, in pertinent part, that "the court may, if satisfied of the owner's good faith (emphasis supplied)," release the building subject to the bond and penalty requirements.

By motion, dated June 15, 1992, a copy of which is set forth in the Appendix at A.74 - A.77, Petitioner moved to dismiss the complaint on the ground that the statutes set forth, supra, were facially

unconstitutional, and unconstitutional as applied. Petitioner's constitutional challenges were rejected by both the District Court (Appellant's Appendix at A.174), and the Minnesota Court of Appeals on appeal. See 504 N.W. 2d at 525-526.

The record in the instant case reflects that the subject premises are owned by co-Defendants Fisher and Olson as tenants in common, each one having a one-half interest in the premises (Appendix at A.169. On August 18, 1988, Petitioner entered into a written lease agreement with Helen Fisher to lease Defendant Fisher's half interest in the premises, and to occupy the subject premises on alternating days.[4] On alternative days, the premises were occupied by one Kyong Ye Firnstahl, pursuant to a separate lease with Defendant Un Sil Olson, then known as Un Sil Berg (Appendix at A. 32). On October 13, 1988, Petitioner entered into an agreement with Defendant Helen Fisher to purchase her one-half interest in the Yoshiko's Sauna business, the purchase to take affect on July 1, 1989, following termination of the

[4]A copy of the lease agreement is set forth in the Appendix at A.29- A.32.

Olson lease to Kyong Ye Firnstahl.[5]

In August, 1990, co-defendant Olson, the owner of the other one-half interest in Yoshiko's Sauna, attempted to assert the right to occupy the premises one-half time, as had been the prior arrangement with Ms. Firnstahl. However, her intent was not to operate the business herself, but rather lease the premises one-half time to co-defendant Suzy Woo Kotts (Petitioner's Appendix at A.84).

Petitioner strenuously objected to this arrangement, and had her attorney write a letter to Ms. Olson, a copy of which is set forth in the Appendix at A.89 - A.9l, dated August 7, 1990, objecting to the proposed lease to Kotts, and asserting that in that Ms. Fisher was a partner of Ms. Olson and that Petitioner had purchased the interest of Ms. Fisher, Ms. Olson could not, under the Uniform Partnership Act, assign her interest in partnership property to Kotts, without Petitioner's consent.

On August 21, 1990, Olson's then attorney, Hosmer A. Brown, wrote to Petitioner's attorney, denying the existence of a partnership, and continuing to assert Olson's right to enter the business and occupy it on

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[5]A copy of the purchase agreement is set forth in Appendix at A.33 - A.44. As a result, between July l, l989, when the Firnstahl lease was terminated until August, l990, Petitioner was the exclusive tenant of Yoshiko's Sauna (Appendix at A.83.)

alternating days.[6]

In response, Petitioner's attorney wrote a letter back to Mr. Brown, continuing to assert Petitioner's right not to have the other half interest in the premises leased out. Petitioner was particularly concerned that Kotts, Ms. Olson's prospective tenant, was a person known to have been repeatedly convicted of prostitution. Petitioner's attorney specifically wrote:

> "[Y]our client's prospective tenant is an individual who has been convicted on at least three occasions of prostitution. Under the provisions of Minnesota Statutes Section 617.80-617.87, should three convictions for misdemeanor prostitution or two convictions for gross misdemeanor prostitution occur within a two-year period, the premises may be closed for all purposes for up to one year, and the personal property therein sold. My client therefore believes that your client's prospective tenant jeopardizes my client's interest in the property." Appendix at A.96.

After both litigation and physical violence were threatened by both sides, Petitioner reluctantly agreed not to attempt to litigate her continued right to occupy the subject premises conclusively, and consented to allow Ms. Olson to lease the subject property to Kotts, with Kotts and Petitioner operating the subject premises on alternate days, in

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[6]A copy of said letter is set forth in Petitioner's Appendix at A.92 - A.93.

exactly the same arrangement that Petitioner had previously had with Ms. Firnstahl (Appendix at A.85 - A.86). Thus, pursuant to her lease with Fisher, Petitioner Magnuson operated Yoshiko's Sauna on Wednesdays, Thursdays, Saturdays, and alternating Sundays, while Suzy Woo Kotts operated the premises, pursuant to her separate lease with Olson, on Mondays, Tuesdays, Fridays, and alternating Sundays (Appendix at A. 86).

Both of the initial convictions which gave rise to Respondent's complaint occurred while Suzy Woo Kotts, not Petitioner, was in exclusive control of the subject premises. The first conviction, a gross misdemeanor prostitution conviction, was of Suzy Woo Kotts herself, obviously, at a time that Petitioner was not in control of the subject premises. Likewise, Lola Jen Ekovena, the second conviction, was arrested on June 4, 1991, on a Tuesday, which was also a day in which Defendant Kotts was in control of the premises. See Appendix at A.5. Finally, the third conviction, that of Kathie Moos, resulted from an arrest on December 10, 1991, also a Tuesday, a day in which the premises were under the control of Kotts. Appendix at A.171.

When Petitioner attempted to confront Suzy Kotts over the fact that she was permitting prostitution to take place on the premises and

failing to pay her share of the bills on the premises, Kotts responded by claiming harassment on the part of Petitioner and obtaining an ex parte temporary restraining order on February 11, 1992.[7] Those proceedings resulted in the issuance of a mutual restraining order by the Hennepin County District Court on March 12, 1992, a copy of which is set forth in the Appendix at A.103 - A.108.

Given the fact that three of the four convictions giving rise to the claim of nuisance occurred during the tenancy of Kotts, Defendants Fisher and Olson, upon the initiation of proceedings by Respondent moved promptly for an order, pursuant to Minn. Stat. § 617.85, to terminate the Kotts tenancy.[8] Although this relief was requested in June, 1992, it was not granted by the District Court until October 28, 1992.[9] Despite the fact that the tenant whose tenancy gave rise to the nuisance had been evicted from the premises, the District Court issued a permanent injunction and order of abatement on February 24, 1993.

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[7]A copy of the order and the affidavit in support thereof are set forth in Petitioner's Appendix at A.98 - A.102.

[8]See Petitioner's Appendix at A.109 - A.112.

[9]See the District Court's order of October 28, 1992, set forth in Petitioner's Appendix at A.164 - A.167.

The order was affirmed by the Minnesota Court of Appeals on August 10, 1993. See City of Minneapolis v. Fisher, supra, 504 N.W. 2d 520 (Minn. App. 1993). On September 30, 1993, the Minnesota Supreme Court denied further review. Appendix at A.202.

Petitioner now seeks a Writ of Certiorari.

ARGUMENT

I. THE DECISION OF THE MINNESOTA SUPREME COURT UPHOLDING THE CONSTITUTIONALITY OF MINNESOTA STATUTES SECTION 617.81-617.87, PERMITTING THE CLOSING OF PETITIONER'S PREMISES, AS A RESULT OF CRIMINAL PROCEEDINGS TO WHICH SHE WAS NOT A PARTY AND AT WHICH SHE HAD NO OPPORTUNITY TO BE HEARD IS IN CONFLICT WITH THE DECISIONS OF THIS COURT, REQUIRING REVIEW UNDER RULE 10(b) OF THIS COURT.

As has already been noted, supra, Minnesota Statutes Sections 617.81, Subd. 2(1), when taken in conjunction with Sections 617.82, 617.83, and 617.85, makes three misdemeanor prostitution convictions or two prostitution convictions of which one is a misdemeanor or felony within two years conclusive evidence that Petitioner's premises are a public nuisance, and mandate the closure thereof for one year and the seizure of personal property, despite the fact that Petitioner was not a party to any of the criminal proceedings which gave rise to the convictions, and despite the fact that Petitioner had no control over

those proceedings whatsoever, including no opportunity to be heard therein. Thus, Petitioner in the instant case was absolutely barred from contesting that acts of prostitution took place on her premises, as a result of criminal convictions of alleged prostitutes, resulting from proceedings in which she was not a party, not privy to any of the parties, over which she exercised no control, and at which Defendants had no opportunity to be heard. It is absolutely clear that such a law violates basic due process guarantees of the Fourteenth Amendment to the United States Constitution.

Directly on point in this regard is the decision of this Court in McKinney v. Alabama, 424 U.S. 669, (1976). In that case, the Court, by Justice Rehnquist, invalidated an Alabama statute which made it a criminal offense to sell a magazine which had previously been judicially found obscene. In that case, a civil action was brought in Mobile County, Alabama, adjudicating four magazines to be obscene. Twelve days after the adjudication, one of the magazines was purchased from the Defendant in Birmingham, Alabama, a different county. Defendant in the Birmingham action had not been a party to the prior action in Mobile County, was not a privy to any party in that action, and had no control over the litigation in Mobile County. Nonetheless, because the

statute prohibited the sale of magazines which had judicially been determined to be obscene, the trial court in Alabama Supreme Court held that he was barred from contesting the obscenity vel non of the magazine in question, and was bound by the results of the prior Mobile County litigation, to which he was not a party. This Court held that such a procedure clearly violated the Defendant's due process rights. In declaring the statute unconstitutional, this Court stated:

> "It is not altogether clear from this record precisely what transpired at the hearing in which New Directions [the allegedly obscene magazine in question] was declared obscene. It does appear that there were in addition to the several magazines named as 'respondents' in the proceeding (footnote omitted), an individual and corporate respondent: Chris Zarocastas, individually and d/b/a Nelson's Newsstand [and] Nelson's News Stand, Inc., a corporation, d/b/a Nelson's News Stand.' The state contends that the existence (footnote omitted) of these parties provides sufficient adverseness in the proceedings to permit its use of the adjudication thus obtained to bind nonparties such as Petitioner.
>
> Our difficulty with this argument is its assumption that the named parties' interest are sufficiently identical to those of Petitioner that they will adequately protect his First Amendment rights. There is no indication that they are privity with him, as that term is used in determining the binding effect of judgments. [Citations omitted]... Such parties may, of course, make their own determination whether and how vigorously to assert their own First Amendment rights. The Constitution obviously cannot force anyone to exercise the freedom of expression which it guarantees. Those who are accorded

> an opportunity to be heard in a judicial proceeding established for determining the extent of their rights are properly bound by its outcome, either because they chose not to contest the state's claim or because they chose to do so and lost.
>
> But it does not follow that a decision reached in such proceedings should conclusively determine the First Amendment rights of others. Nonparties like Petitioner may assess quite differently the strength of their constitutional views regarding the desirability of disseminating particular materials. We think they must be given the opportunity to make these assessments themselves, as well as the chance to litigate the issues as they so choose." 424 U.S. at 675-676.

Although McKinney v. Alabama, dealt with a First Amendment, as well as a Fourteenth Amendment question, numerous courts which have considered the issue both before and after McKinney have clearly held the principle to apply in non-First Amendment contexts. For example, in United States v. Thoresen, 428 F. 2d 654 (9th Cir. 1970), the court considered a criminal case in which charges were brought against both a husband and wife. Initially, all counts were dismissed against the wife, and the husband later brought various motions to suppress evidence, which were denied. The indictment was later dismissed against the husband as well. Both Defendants were subsequently reindicted, and both Defendants again moved for suppression of the evidence. The court held both the husband and wife to be bound by the adverse

decision on the husband's prior suppression motion, despite the fact that the wife had not been a party to that proceeding. On appeal the court it to be denial of due process to refuse to allow the wife to be heard on suppression motions, as the result of proceedings to which she was not a party. The court stated:

> "Absent some showing that Mrs. Thoresen stipulated to, or acquiesced in, the trial court's reliance on the transcript of the first suppression hearing, in which she was not a party, we do not believe she can be denied a complete hearing on all search and seizure problems which bear upon her conviction." Id. at 667.

A similar result was reached in United States v. Schmidt, 604 F. 2d 236 (3rd Cir. 1979), when a Defendant in a conspiracy case was denied a suppression hearing, on the basis of the results of a prior suppression hearing in the case of one of his alleged co-conspirators. In declaring it to be unconstitutional to bind the Defendant by the results of the hearing on a co-conspirator's motion, the court stated:

> "Schmidt contends that the District Court erred in denying his motion for a suppression hearing. The court's rationale was that it had previously denied a suppression motion by Schmidt's co-conspirators which challenged the same search to which Schmidt objected, and that Schmidt had no new evidence to offer. We believe, however, it is elemental that a Defendant may not be denied a suppression hearing solely on the basis of a previous hearing to which the Defendant was not a party, unless there is a showing that the Defendant had

stipulated to or acquiesced in the trial court's reliance on the transcript of the prior hearing." Id. at 238.

In reaching its holding, the court specifically relied upon McKinney v. Alabama, supra, 424 U.S. 669, (1976). See 604 F. 2d at 238, n.5.

The principle was again enunciated in American Postal Workers Union, Columbus Area Local, AFL-CIO, v. United States Postal Service, 736 F. 2d 317 (6th Cir. 1984), in which a local union filed a civil action to enjoin the postal service from disciplining postal workers for failure to maintain an adequate work schedule, when their absence was caused by use of approved sick leave. The trial court dismissed the lawsuit, on the ground that a similar lawsuit brought by a Dallas local of the same union had been dismissed, holding that a decision involving the Dallas local was res judicata as to the Columbus local. In reversing the dismissal on appeal, the court stated:

> "We agree with the union that res judicata does not lie in this case for two reasons. First, there is insufficient evidence that the Columbus local was in privity with the Dallas local. The trial court seemed to believe that because there was an identity of interests between the two locals, the Columbus local's lawsuit could be barred by the Dallas decision. However, identity of interests, without more, will not suffice to a bar a suit by a nonparty." [Citations omitted.]" Id. at 318.

Among the citations omitted from the quotation, relied upon by the court was McKinney v. Alabama, supra, see Id. at 318.

Also on point is Blonder-Tongue Laboratories, Inc. v. University of Illinois Foundation, 402 U.S. 313, (1971), in which this Court made it clear that the rule against applying collateral estoppel to a non-party to a prior litigation is grounded in the constitutional principle of due process of law. In Blonder-Tongue, the Court stated:

> "Some litigants, those who never appeared in a prior action -- may not be collaterally estopped without litigating the issue. They have never had a chance to present their evidence and arguments on the claim. Due process prohibits estopping them despite one or more existing adjudications of the identical issue which stand squarely against their position (emphasis supplied)." Id. at 329.

Likewise, in Fuentes v. Shevin, 407 U.S. 67, (1972) this Court stated:

> "The constitutional right to be heard is a basic aspect of a duty of government to follow a fair process of decision-making when it acts to deprive a person of his possession...No better instrument has been devised for arriving at the truth than to give a person in jeopardy of serious loss notice of a case against him and an opportunity to meet it." 407 U.S. at 80-81.

More directly on point is this Court's recent decision in United States v. Good Real Property, __ U.S.__, 62 U.S.L.W. 4013 (December

13, 1993), in which this Court held that forfeiture of real property pursuant to Title 21 U.S.C. Section 881(a)(7), on the basis of its being used to facilitate a drug transaction, without prior notice to the property owner and an adversary hearing on the merits of the forfeiture claim violated the Due Process Clause of the Fourteenth Amendment, notwithstanding the fact that the property owner had in fact pled guilty to promoting a harmful drug, as a result of 89 pounds of marijuana having been seized from the very home from which forfeiture was sought. This Court rejected the assertion that the property owner's own prior plea of guilty deprived him of the right to a hearing on the substance of the forfeiture charge, stating:

> "[T]he suggestion that this one Petitioner must lose because his conviction was known at the time of seizure, and because he raises an as applied challenge to the statute, founders on a bedrock proposition: fair procedures are not confined to the innocent. The question before us is the legality of the seizure, not the strength of the Government's case." Id. at 4018. T

Thus, if it was a deprivation of due process to deprive the property owner in Good of the hearing on the merits, based upon that property's own conviction and plea of guilty, than it is certainly more violative of due process to deprive this Petitioner of all use of her property for a period of one year, based upon the conviction of three

other persons, in proceedings at which she had no opportunity to be heard.[10]

Petitioner's situation is even further aggravated by the fact that, under the decisions of the United States Supreme Court in North Carolina v. Alford, 400 U.S. 25, (1970), and the Minnesota Supreme Court in State v. Goulette, 258 N.W. 2d 758 (Minn. 1977), a Defendant may enter a plea of guilty to a criminal charge, while continuing to deny that he or she committed the offense. As a result, if a Defendant enters a plea under Alford and Goulette, denying that he or she committed the prostitution offense in question, that plea of guilty remains absolutely binding upon the Defendant in a subsequent nuisance action under Sections 617.80-617.87, even though the Defendant entering the plea absolutely denied having committed the offense in question. Such a result is plainly inconsistent with basic due process requirements.

In rejecting the Petitioner's constitutional challenges to the statute, the Minnesota Court of Appeals relied exclusively on Hvamstad v. Suhler, 727 F. Supp. 511 (D. Minn. 1989), aff'd, 915 F. 2d 1218 (8th Cir.

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[10]Obviously, neither the Minnesota Court of Appeals nor the Minnesota Supreme Court had the benefit of the result of United States v. Good Real Property, supra, before it when it rendered its decision in the above-entitled matter. Obviously, an appropriate disposition would be to remand the matter to the Minnesota Supreme Court for reconsideration in light of this obviously controlling decision.

1990). See 504 N.W. 2d at 525-6. The decision is both unpersuasive or indistinguishable and should not be followed. To begin with, the District Court in Hvamstad stated the following:

> "Section 617.82 provides that no injunction can be issued without a prior show cause notice of hearing to the landowner and an opportunity for the landowner to be heard. Section 617.83 further provides that upon proof of a nuisance as defined in the statute, the court shall issue a permanent injunction and order an abatement. Thus, it is clear that the statute requires a hearing where the landowner has an opportunity to prove that there were no alleged convictions for the crimes described in the statute and occurring on the owner's property. Such a hearing satisfies due process requirements." 727 F. Supp. at 519.

The fallacy in the argument is obvious. The "opportunity" is only to prove that no convictions occurred, not that no prostitution occurred. This is precisely the same "opportunity" held insufficient in McKinney, in which it was clear that the Defendants had the "opportunity" to prove, not that the magazine in question was not obscene, but only that it had not been found obscene in another judicial proceeding to which they were not a party. Obviously, the very essence of McKinney and its progeny are that such an "opportunity" is no opportunity at all, for due process purposes.

Equally unpersuasive was the second argument advanced by the

District Court in Hvamstad[11], which was the following:

> "The legislature, in outlining the number of crimes necessary to automatically invoke the statute, was simply making a judgment under its police power as to what constitutes a nuisance. Such a legislative determination is subject to challenge only if no reasonably conceivable set of facts could establish a rational relationship between the statute and a legitimate end of government. See, e.g. United States v. Carolene Products Co., 304 U.S. 144, 154 (1938). The legislature could properly conclude that convictions of prostitution or gambling on property are sufficient evidence that property has become a nuisance." 727 F. Supp. at 514.

The District Court's opinion ignores the fact that it was precisely such a legislative determination which the United States Supreme Court invalidated in McKinney v. Alabama, supra, 424 U.S. 669 (1976). Moreover, as already noted, supra, although McKinney involved the question of First Amendment rights, cases subsequent to McKinney have repeatedly relied upon McKinney in non-First Amendment contexts, to support the proposition that it is violative of due process to bind a litigant to the results of a proceeding in which he did not participate and had no opportunity to be heard, regardless of the absence of First Amendment implications. See United States v. Schmidt, supra, 604 F. 2d 236, 238, n. 5 (3rd Cir. 1979); American Postal Workers Union,

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[11]This rationale was the sole rationale relied upon by the Eighth Circuit in affirming the District Court decision. See 915 F. 2d at 1219-1220.

Columbus Area Local, AFL-CIO v. United States Postal Service, supra, 736 F. 2d 317, 318 (6th Cir. 1984); and Martin v. Wilks, 409, U.S. 755, (1989).

One additional note should be made concerning Hvamstad v. Suhler, supra. Among the arguments advanced by the Eighth Circuit in Hvamstad in upholding the statute against a due process challenge is the reliability of prior criminal convictions, since they are premised on a requirement of prove beyond a reasonable doubt. However both this Court and the Minnesota Supreme Court, in adopting their respective Rules of Evidence, have plainly given an indication of the reliability they attach to misdemeanor and gross misdemeanor convictions. In particular, Rule 803(22) of both the Federal Rules of Evidence and the Minnesota Rules of Evidence limit their exceptions to the hearsay rule concerning criminal convictions to those convictions involving crimes "punishable by death or imprisonment in excess of one year ...."

The Advisory Committee's Note to Rule 803(22) of the Federal Rules of Evidence states the following:

> "Practical considerations require exclusion of convictions of minor offenses, not because the administration of justice in its lower echelons must be inferior, but because motivation to defend at this level is often minimal or nonexistent. [Citations omitted.] Hence the rule

> includes only convictions of felony grade, measured by federal standards."[12]

Consequently, criminal convictions which the Minnesota Supreme Court and this Court deem too inherently unreliable, even to be admitted into evidence as against the hearsay objection, are conclusive, as against Petitioners in this case. A more serious procedural due process violation could hardly be imagined.

However, even assuming Hvamstad were correctly decided and thus controlling, Hvamstad is plainly distinguishable on the facts, and that distinction plainly compels invalidation of the statute as applied to the facts in this case. In affirming the District Court decision in Hvamstad, the Eighth Circuit stated the following:

> "If the statute permitted abatement on evidence of a single conviction with no opportunity for the property owner to deny the underlying act or first to eliminate the illegal act himself, the law would likely neither be reasonable nor constitutional.
>
> However, the abatement statute sub judice is designed to

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[12]In the present case, the plea of Kathie Lee Moos provides a perfect illustration of why both the Minnesota and this consider convictions of less than felony level to lack sufficient reliability to be admissible, because of lack of motivation to defend. The Court records of Ms. Moos's plea of guilty were received in evidence and a copy is set forth in Petitioner's Appendix at A.132 - A.134. As that record indicates, Ms. Moos, needing $1,000.00 bail to get out of jail pending trial, was offered a plea of guilty in exchange for $25 fine and no executed jail time. Given a prosecutor's virtually unlimited power to buy a plea of guilty with such an offer, there is little wonder why such pleas should be considered unreliable.

> encourage property owners to abate the basis of the nuisance themselves by delivering notice of conviction to the owners. Those owners who do not abate the criminal activity, and instead allow it to continue on their premises despite the Notices of Conviction therefrom, then face a judicial determination of nuisance and abatement based on the convictions, not the acts."
> 915 F. 2d at 1220.

Thus, the Eighth Circuit plainly premised its finding of constitutionality on the notion that a property owner would receive notice of the first conviction and could use such notice to prevent the second and third convictions from taking place. The Eighth Circuit plainly held that it was unconstitutional either to deny the property owner the right to contest the underlying conduct in the first instance, or, upon receiving notice of the conduct, the opportunity to eliminate future illegal conduct. In fact, that is precisely what took place in the instant case.

In the instant case, three of the four convictions occurred while Petitioner Magnuson had no control of the premises whatsoever.[13]

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[13] The only conviction that occurred arising out of Petitioner's operations resulted from an arrest that occurred on March 19, 1992, the last of the four convictions. The conviction (although not the underlying conduct) occurred on September 24, 1992, after the court had already issued its temporary injunction halting further operation of Yoshiko's Sauna. Thus, Petitioner was not in a position where she received initial notices of conviction and failed to correct an existing situation on her premises. All predicate convictions occurred while she had absolutely no control of the premises, and no opportunity to prevent future conduct from occurring. In such circumstances, it is clear that even the Hvamstad

II. THE STATUTES ARE FURTHER UNCONSTITUTIONAL IN THAT THEY VIOLATE PETITIONER'S RIGHT TO FREEDOM OF ASSOCIATION AS GUARANTEED BY THE FIRST AND FOURTEENTH AMENDMENTS TO THE UNITED STATES CONSTITUTION.

What is particularly noteworthy about Minnesota Statutes Sections 617.80-617.87 is the fact that the statute does not require as the owners or tenants of buildings, themselves engage in any unlawful activity. All that is required is that they own a building in which three misdemeanor convictions for prostitution arise, or two convictions, at least one of which is a gross misdemeanor or felony, arise. The conduct giving rise to the conviction need not be committed by Petitioner herself, or by anyone acting with her knowledge or authorization. The conduct may be committed by tenants, visitors, or even trespassers on the premises. Thus, Petitioner is subject to having their premises closed, not for her own conduct, but rather solely for association with others who engage in wrongful conduct.

As such, the statute violates long-standing principles repeatedly enunciated by this Court, holding that the Freedom of Association guarantee of the First Amendment, as applied to the states by the

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decision would declare both the injunction and abatement order to be a violation of due process.

Fourteenth Amendment, prohibits the imposition of criminal or civil liability upon one person for the criminal conduct of another, in the absence of a showing of knowledge of that conduct and the specific intent to further the illegal conduct. See, for example, Elfbrandt v. Russell, 384 U.S. 11 (1966); Keyishian v. Board of Regents of the State University of New York, 385 U.S. 589 (1967); United States v. Robel, 389 U.S. 258 (1967); Healy v. James, 408 U.S. 169 (1972); and N.A.A.C.P. v. Clairborne Hardware Co., 458 U.S. 886 (1982). The overbreadth of the statute, as far as invasion of associational rights is concerned, becomes readily apparent when one examines the definitions contained in the applicable Minnesota statutes.

For example, Minnesota Statutes Section 617.80, Subd. 4 defines the term "prostitution" as "the conduct defined in Sections 609.321 to 609.324." Minnesota Statutes Section 609.321, Subd. 9, in turn, defines the term "prostitution" as "engaging or offering or agreeing to engage for hire in sexual penetration or sexual contact." Minnesota Statutes Section 609.324, Subd. 3, in turn, makes a simple offer or agreement to engage in prostitution a misdemeanor offense, but also makes the offense a gross misdemeanor, if the offer or agreement occurs in a "public place". Thus, what is required to mandate the closure of an

establishment such as Petitioner's is not the actual commission of an unlawful sex act on the premises, but only engaging in a conversation in which the act is either offered or an offer to engage in the act is accepted. If the premises are an establishment open to the public, only two such conversations within a two-year period result in mandatory closure of the establishment.[14] As a result, any person operating any establishment open to the public, at which two people may engage in a conversation, is subject to penalty under this statute. Obviously, a prohibited conversation can occur in any hotel, office building, restaurant, bar, church, synagogue, assembly hall, or even government building, at which two people can meet and converse. Plainly, the statute gives to prostitutes an unlimited authority to force the closure of any such building in the State of Minnesota, since all that is required is that the prostitute engage in a prohibited conversation in that building, either two or three times, in order to mandate the closure.

More frighteningly, however, it gives that same authority to police. Obviously, if the police desired to close down the Marriott Hotel in the City of Minneapolis, all that would be required under the statute

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[14] See Minnesota Statutes Section 617.81, Subd. 2(1).

would be for an undercover officer to rent a room in the Marriott on two separate occasions, and call two outcall prostitution services to his room, giving him the two gross misdemeanor convictions necessary to close down the Marriott Hotel. Police could do exactly the same thing, not only to every hotel or motel, but to virtually any building in the state open to the general public, including of course, any restaurant, bar, church, synagogue, office building, meeting hall, or even courthouse in which an undercover officer can arrange to meet a prostitute from an outcall service. Obviously, the harm that can be done to associational and expressive rights by granting such authority to police is limited only by the willingness of the police to exercise such authority.[15]

CONCLUSION

For all of the foregoing reasons, Petitioner's Petition for Writ of

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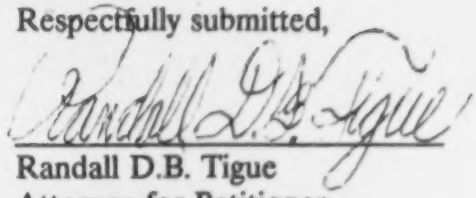
[15]The courts in Hvamstad v. Suhler, supra, clearly erred in rejecting a freedom of association challenge to the statute in question, in reliance on Roberts v. United States Jaycees, 468 U.S. 609 (1984), and Board of Directors of Rotary International v. Rotary Club of Duarte, 481 U.S. 537 (1987), holding that only "intimate" and "expressive" associations were entitled to constitutional protection. The Hvamstad courts failed to distinguish between mere regulation of association, as was the case in Robert and Rotary International, and criminally or civilly punishing the fact of association itself, something which this Court and others have clearly prohibited, even in the absence of an intimate or expressive type of association. See, for example, Scales v. United States, 367 U.S. 203, 224-225, 229-230 (1961); Coates v. Cincinnati, 402 U.S. 611, 615-616 (1971); Tyson v. New York City Housing Authority, 369 F. Supp. 513 (S.D.N.Y. 1974); Sawyer v. Sandstrom, 615 F. 2d 311 (5th Cir. 1980); and Fisher v. Snyder, 346 F. Supp. 396 (D. Neb. 1972), aff'd 476 F. 2d 375 (8th Cir. 1973).

Certiorari should be, in all respects, granted.

Respectfully submitted,



Randall D.B. Tigue
Attorney for Petitioner
2620 Nicollet Avenue
Minneapolis, Minnesota 55408
(612) 874-9903

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